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No. 79-1519

# In the Supreme Court of the United States

OCTOBER TERM, 1979

PERRY LEVEY AND MYRON LEVEY, PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

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Petitioners seek review of the portion of the decision of the court of appeals enforcing several Internal Revenue summonses directing certain financial institutions to produce retained copies of Forms 1087 and 1099.[1]

The pertinent facts are undisputed and may be summarized as follows: As part of his investigation of petitioners' income tax liabilities, Special Agent John R. Cassie, Jr., of the Criminal Investigation Division, Internal Revenue Service, issued the summonses here in

[1]These forms are used to report to the Internal Revenue Service interest and dividend payments. The payor which prepares each form files one copy with the Internal Revenue Service, provides one copy to the recipient for use in preparing his tax return, and retains one copy in its files. Form 1099 is used by the original payor and Form 1087 is filed by a record recipient of the payment showing the distributions to the actual recipient of the funds (Pet. App. A 5a, n.2).

question directing various financial institutions to produce their records of all of petitioners' accounts and financial transactions including all retained copies of Forms 1087 and 1099. The district court ordered the summonses enforced for all other items but denied enforcement as to the retained copies of Forms 1087 and 1099. The district court reasoned that since copies of each form had been filed with the Internal Revenue Service, the Service had the information contained in those forms in its possession, despite the fact that the Service's retrieval of specific forms from its files is impossible (Pet. App. C 25a-27a).

The court of appeals held the summons fully enforceable. It therefore reversed the portion of the district court's order denying enforcement as to the Forms 1087 and 1099 (Pet. App. A 11a-15a). In so holding, it followed its own precedent and that of the other courts of appeals that the Internal Revenue Service may obtain information by summons even though the documents containing the information sought are already in the Service's physical possession but there is no practical method of retrieving those documents from its files. See *United States* v. *Berkowitz*, 488 F. 2d 1235, 1236 (3d Cir. 1973), cert. denied, 421 U.S. 946 (1975); *United States* v. *Theodore*, 479 F. 2d 749, 755 (4th Cir. 1973); *United States* v. *Turner*, 480 F. 2d 272, 274-275 (7th Cir. 1973); *United States* v. *Schwartz*, 469 F. 2d 977, 985 (5th Cir. 1972).

Petitioners contend (Pet. 4-5) that a summons may not be enforced if the information sought by the summons is contained in a document which is already in the possession of the Internal Revenue Service, even if the document itself may be irretrievable or may have been



destroyed. But the courts of appeals have uniformly rejected such an argument. If a document, although physically in the possession of the Internal Revenue Service, is inaccessible or incapable of being retrieved, then the information contained in that form or document is not "already within the Commissioner's possession" for purposes of the investigation at issue. See *United States* v. *Powell*, 379 U.S. 48, 58 (1964). See also *United States* v. *Berkowitz*, *supra*; *United States* v. *Theodore*, *supra*, 479 F. 2d at 755; *United States* v. *Turner*, *supra*.

Contrary to petitioner's contention (Pet. 6), the decision below does not conflict with *United States* v. *Theodore*, *supra*. There, the court held (479 F. 2d at 755) that under *Powell*, "[t]he obligation is upon the Commissioner to demonstrate that the material requested is not within his possession or, if it is technically within his possession, he has no practical way of obtaining the desired item." The Commissioner has met that test in the instant case. As the court of appeals observed (Pet. App. A 12a), the Forms 1087 and 1099 are stored without any indexing system and, due to the sheer volume of forms, are irretrievable as a practical matter. Furthermore, they are usually discarded after about five years because of the substantial number of such documents. The decision below therefore correctly enforced the summons requesting production of petitioners' non-wage income from their financial institutions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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